IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	**:**	
	:	
v.	**:**	**CRIMINAL ACTION**
	:	**No. 98-587-5**
WILLIAM COLON	**:**	

Anita B. Brody, J. April __, 2000

MEMORANDUM

Defendant William Colon moved to suppress five statements made by the defendant prior to trial. The five statements were taken on: (1) October 10, 1997 by Detective Nicholas Via of the Philadelphia Police Department (PPD), see Ex. G-B; (2) December 31, 1997 by Sergeant James Smith of the PPD, see Ex. G-C; (3) December 31, 1997 by Agent Anthony Tropea of the ATF, see Ex. G-D; (4) January 5, 1998 by Tropea, see Ex. G-E; and (5) January 15, 1998 by Tropea, see Ex. G-F. On December 6 and 7, 1999, before trial began, I held a hearing on the motion. On December 7, 1999, in open court, I denied the motion to suppress as to all statements.

Facts

On August 1, 1996, Nicholas Via, a detective in the Philadelphia Police Department

(PPD), was assigned to investigate a shooting that occurred earlier that day at the intersection of 7th and Tioga Streets in Philadelphia. The next day, August 2, Via learned that a man who lived at the corner of 7th and Tioga Streets had set up a surveillance video camera on the porch of his house and that the camera had recorded the shooting. A segment of the video depicts a man crossing the intersection with a firearm.

Approximately one year later, on July 30, 1997, defendant Colon was arrested by the PPD for possession with intent to deliver drugs. At the time of the arrest, Colon was a minor and, according to Colon, his mother hired an attorney, Stephen Jarrett, to arrange for Colon's release on bail. Although Jarrett was allegedly hired by Colon's mother, there is no record that Jarrett ever entered an appearance for Colon. Approximately one week after his arrest, Colon was released on bail.

On September 3, 1997, approximately one month after he was released on bail, Colon was again arrested by the PPD for possession with intent to deliver drugs. On September 21, 1997, Colon was involved in an unrelated shooting of Valentine Rodriguez. A few weeks later, on October 10, 1997, Colon was arrested and held in custody for shooting Valentine Rodriguez. While Colon was in custody, Detective Griffin of the PPD was investigating the Valentine Rodriguez shooting and learned that Colon might have information about the August 1, 1996 shooting. Griffin mentioned to Detective Via that Colon might be able to help his investigation of the August 1, 1996 shooting.

Later that day, Via met with Colon and thought that Colon appeared eager to speak with him. Via read Colon his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.E.D.2d 694 (1966), and Colon signed a written waiver of his rights. See Ex. G-B. After Colon

waived his Miranda rights, Via and another Philadelphia Police Detective, Matthew McDonald, interviewed Colon exclusively about the August 1, 1996 shooting. In the course of the interview, Via showed Colon the videotape of the August 1, 1996 shooting and asked Colon if he was the man crossing the intersection with the firearm. Colon responded, "Yeah, that's me."

At the time of the questioning on October 10, 1997, Via believed that it was possible that Colon was part of the Lazara Ordaz drug operation, whose members sold drugs at the corner of 8th and Tioga streets. He was unaware, however, of any pending drug charges against Colon or the reason why Colon was being held in custody. Furthermore, Via did not know whether Colon was represented by counsel and he did not ask Colon if he were represented by counsel. Throughout the questioning, Colon never suggested that he had an attorney and he did not request to speak with one.

At some point between October 10 and December 31, 1997, Colon was released on bail for the Valentine Rodriguez shooting. When Detective Via learned that Colon was released on bail, he arranged for a state court warrant to arrest Colon for the August 1, 1996 shooting. Pursuant to the warrant, on December 31, 1997, Colon was arrested for the August 1, 1996 shooting. Sergeant James Smith, a detective in the PPD, was on duty that day when Colon was arrested.[1] After Smith checked if there were any outstanding warrants against Colon or if Colon had failed to appear in a criminal proceeding, he went to Colon's cell room to advise him of the charges against him and confirm his biographical information. When Smith introduced himself to Colon in the cell room, Colon acted anxious to speak with him and blurted out, "I want to tell you everything."

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[1] Via was not on duty when Colon was arrested on December 31, 1997.

Because Colon wanted to make a statement, Smith took him away from the other detainees in the cell room to an interview room on the second floor of the station. Colon never asked to speak to an attorney, but he did ask if he could call his mother. Smith permitted Colon to speak to his mother for a few minutes and helped Colon dial the phone number. As Colon was talking with his mother, Smith overheard Colon say, in English: "I'm tired of this, I don't care, I'm going to tell them." After Colon finished speaking with his mother, Smith read him his Miranda rights and Colon signed a written waiver of his rights. See Ex. G-C. Smith then took Colon's statement.

In the course of the interview, Colon told Smith that he worked for the Ordaz drug organization and gave details about the August 1, 1996 shooting. Colon told Smith that: "I want to be on the stand and tell everybody at [Lazara Ordaz's] trial that she paid me to carry that gun." Ex. G-C at 2. Colon also said that the reason he wanted to tell the police about the Ordaz drug organization was that he was angry at them for refusing to help him while he was in jail. Colon told Smith that "[i]f everything turns out alright here you can call me or beep me and I'll help you indict Lazara [Ordaz] [because] she [sic] too smart." Ex. G-C, at 8. As Colon was giving his statement, Smith wrote Colon's statement on paper. At the end of the interview, another officer of the PPD, Detective Michael Bloom, reviewed the written statement with Colon. As he reviewed the statement with Detective Bloom, Colon corrected some minor errors and initialed the corrections. The interview lasted about two hours. See Ex. G-C.

After the interview, Smith contacted PPD Detective William Kelly, a member of the High Intensity Drug Trafficking Area Task Force ("HIDTA"). HIDTA was a joint task force of the PPD and the United States Bureau of Alcohol, Tobacco and Firearms (ATF) that was targeting

highly violent areas of Philadelphia and had been investigating the Ordaz drug organization since October 1997. Special Agent Anthony Tropea of the ATF was also a member of the HIDTA task force and was leading the Ordaz investigation. In mid-December, 1997, during the course of the Ordaz investigation, Tropea glanced at Colon's prior criminal history. Colon's record included arrests for drug sales on July 30, 1997 and September 3, 1997 and stated that the disposition of charges against Colon were "unreported." Tropea did not know whether Colon was represented by counsel for any charges, and he had no reason to believe that Colon had an attorney.

On December 31, 1997, Agent Tropea learned that Colon was in custody and had given a statement to Smith earlier that day. About four hours after Smith's interview with Colon, Tropea and Detectives McDonald, Robert Lodise, and Carol Adomaitis met with Colon. After Colon received his Miranda warnings for the second time that day, he signed another waiver of his rights. See Ex. G-D. Before the interview, Tropea asked Colon whether he was represented by counsel and Colon clearly stated that he did not have an attorney. Tropea then interviewed Colon and took a written statement from him, in which Colon detailed the operation of the Ordaz organization. At the end of the interview, Colon told Tropea: "I want to help out in any way I can. I want to keep helping you." Id. at 7.

A few days later, on January 5, 1998, Tropea instructed Detectives Lodise and Adomaitis to retrieve Colon from the detention center for another interview. Before the interview, Tropea read Colon his Miranda warnings again and Colon waived his rights for the fourth time. See Ex. G-E. Like the December 31, 1997 meeting, Tropea asked Colon if he had an attorney and Colon again assured Tropea that he was not represented. See Tr. at 90. Colon then gave Tropea another statement that further detailed the Ordaz drug operations and identified members of the

organization from police photographs. Colon also briefly discussed the drug sale that led to his arrest on July 30, 1997.

On January 15, 1998, Tropea had Detectives Lodise and Adomaitis escort Colon back to the ATF Division office to conduct another interview. At the beginning of the interview, Tropea asked Colon again whether he had an attorney. Once again, Colon responded that he did not have an attorney. In light of Colon's three previous statements and his apparent willingness to cooperate with the police, Agent Tropea considered Colon to be a cooperating witness, and therefore, did not review the Miranda warnings with Colon before the January 15, 1997 interview. After Colon's statement, Tropea summarized the interview on the ATF 3270 "Report of Investigation" form. During this interview, Colon gave detailed information about the August 1, 1996 shooting and other incidents related to the Ordaz drug organization. Colon also insisted that he wanted to continue cooperating with the government.

On January 26, 1998, Adomaitis and Lodise went to the detention center to speak with Colon about the possibility of getting him released on bail. In this conversation, Colon told Adomaitis and Lodise that he did not have an attorney and that he would need an attorney to be released on bail. As the conversation with Colon progressed, Adomaitis was simultaneously taking hand-written notes of the conversation, writing: "Needs a lawyer, see if we can get a court appointed lawyer." Ex. G-H.

At some point in the next four to six weeks, Lodise and Adomaitis went back to the House of Corrections to bring Colon to the ATF division for a fourth interview. While en route to the ATF division, Colon told Adomaitis and Lodise that he did not want to talk with the agents any further. At the ATF office, Tropea confirmed that Colon did not want to give any additional

information. Tropea then concluded the interview and Colon was returned to the detention center.

Between four and eight weeks later, Tropea learned that Jarrett was representing Colon. After learning this, Tropea and the federal prosecutor met with Jarrett and Colon to discuss a cooperation agreement. The parties did not reach an agreement about Colon's cooperation.

At some point in September, 1998, the pending state charges regarding the July 30, 1997 and September 3, 1997 arrests against Colon were dismissed in favor of the federal investigation. In December 1998, the HIDTA investigation of the Ordaz drug operation resulted in a 76-count indictment against 18 members of the organization. William Colon was indicted for (1) conspiring to distribute cocaine (Count 1), (2) possession with intent to distribute arising from the arrest on July 30, 1997 (Count 3), (3) possession with intent to distribute arising from the arrest on September 3, 1997 (Count 4), (4) using a firearm in the commission of a drug offense for the August 1, 1996 shooting (Count 70), and (5) using a firearm in the commission of a drug offense for the September 21, 1997 shooting (Count 72). At the arraignment for charges in the federal indictment on January 28, 1999, Colon declared that Stephen Jarrett was not his attorney and requested that counsel be appointed for him. The next day, counsel was appointed to represent Colon for the charges in the federal indictment.

Colon moved to suppress the five statements that he gave on October 10, 1997, December 31, 1997, January 5, 1998, and January 15, 1998. The basis for suppression was that the officers elicited the statements in violation of Colon's Sixth Amendment right to counsel. Colon also argued that the January 15, 1998 statement was inadmissible because the questioning violated his Fifth Amendment rights because he was not given Miranda warnings before that interrogation.

On December 6 and 7, 1999, I held a hearing on the suppression motion. At the hearing, Special Agent Tropea, Sargent Smith, and Detectives Via, Bloom, McDonald, Lodise, and Adomaitis testified for the government. Colon testified on his own behalf and stated that his mother hired Jarrett in August 1997 to arrange for his release on bail for the July 30, 1997 arrest. At the conclusion of the testimony and oral argument, I denied Colon's motion to suppress.

After the hearing, the matter proceeded to trial and the statements were admitted as evidence against Colon. During the trial, the government and Colon agreed to dismiss Count 4 of the indictment, which arose from Colon's September 3, 1997 arrest. The jury found Colon guilty of conspiracy to distribute cocaine (Count 1), possession with intent to distribute cocaine arising from his July 30, 1997 arrest (Count 3), and using or carrying a firearm during and in relation to a drug crime arising from the August 1, 1996 shooting (Count 70). Colon was found not guilty of using or carrying a firearm during and in relation to a drug crime that occurred on September 21, 1997 (Count 72).

Sixth Amendment right to counsel

Colon moved to suppress the five statements on the basis that the interviews violated his Sixth Amendment right to counsel. The Sixth Amendment establishes a criminal defendant's right to the assistance of counsel. See United States v. Gouveia, 467 U.S. 180, 187 (1984). This right to counsel arises at the initiation of adversarial judicial proceedings against the defendant. See Kirby v. Illinois, 406 U.S. 682 (1972). Judicial proceedings against an accused include the "formal charge, preliminary hearing, indictment, information, or arraignment." Id. at 688-89. Thus, when formal criminal charges are brought against an accused, the Sixth Amendment

establishes the defendant's right to have an attorney to assist in his defense.

The defendant may choose to exercise his right to counsel or face the government prosecution without an attorney. See Patterson v. Illinois, 487 U.S. 285, 291, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988). A defendant invokes his Sixth Amendment right to counsel by retaining an attorney or requesting that an attorney be appointed for him. See id. at 290, n.3. Defendants' invocation of their right to counsel under the Sixth Amendment must be clear and unequivocal. See Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).[2] Once an accused invokes the Sixth Amendment right to counsel for a formally-charged offense, the government is forbidden from deliberately eliciting incriminating evidence from the defendant about the crime outside the presence of his counsel. See Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). The Sixth Amendment right to counsel is "offense-specific," in that it attaches only to the specific offense that has been formally charged.

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[2] In Davis, the Supreme Court held that in order for a suspect to invoke a right to counsel, he or she must do so clearly and unequivocally. See 512 U.S. at 459. The suspect in Davis stated during a police interview, "Maybe I should talk to a lawyer." The Court held that this statement was too ambiguous to invoke the suspect's right to counsel.

The effect of the Davis ruling may be to place the burden of persuasion on the discrete issue of invocation of the right to counsel on the defendant to establish that he clearly invoked his Sixth Amendment right. See id. Thus, unlike the burden of persuasion in motions to suppress arising under the Fourth or Fifth Amendments, in which the government must prove that it did not violate the defendant's constitutional rights, see, e.g., Bumper v. North Carolina, 394 U.S. 165, 183, 89 S.Ct. 961, 20 L.Ed.2d 797 (1968), Colorado v. Connelly, 479 U.S. 157, 168, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), the government may not be required to persuade the court that the defendant did not invoke his Sixth Amendment right to counsel. Instead, the defendant in a Sixth Amendment case may have to establish that his statement was a clear and unequivocal invocation of his right to counsel. The issue is not whether, under an objective standard, the statement was ambiguous, but whether it was unequivocal. Thus, the burden of persuasion for this component of a motion to suppress may have effectively shifted to the defendant. See id.; see also, John T. Reed, Davis v. United States, 33 Duq. L. Rev. 1109, 1126 ("The holding in Davis places the burden on the suspect to prove that he positively invoked his right to counsel").

See McNeil v. Wisconsin, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). Because the Sixth Amendment right to counsel attaches only to a formally-charged offense, the government may question the defendant outside the presence of counsel about crimes that have not been charged. See Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

Although the scope of the Sixth Amendment right to counsel is limited to the formally-charged crime, the Third Circuit has adopted a narrow exception to the offense-specific rule, in which the Sixth Amendment right to counsel for a pending charge may carry over to uncharged offenses when the uncharged offenses are "inextricably intertwined" with the pending charge. See United States v. Arnold, 106 F.3d 37, 42 (1997). An uncharged offense is inextricable intertwined with the charged offense when the two arise from precisely the same acts and factual predicates. See id. at 41. To determine whether the two charges arise from the same factual predicates, courts have looked for "similarities in time, place, person and conduct." Id. Therefore, the Arnold court established that the government could violate the accused's right to counsel if it deliberately elicits incriminating evidence outside the presence of his counsel about the pending charge or offenses that are inextricably intertwined to the pending charge after the accused has invoked his Sixth Amendment right to counsel. See id. at 42.

If an accused does not invoke his Sixth Amendment right to counsel, he can waive his right to an attorney and face the government prosecution without counsel. See Patterson, 487 U.S. at 291. A waiver by an accused of his Sixth Amendment right to counsel is valid only if the accused knew of his right to have counsel and of the consequences of forgoing that right. See id. at 292-3. For waiver of the right to counsel at postindictment questioning, the Miranda warnings are sufficient to apprise an accused of his right to counsel and the consequences of forgoing

counsel. See id. at 298-99. Therefore, if a defendant has not invoked his Sixth Amendment right to counsel and has received Miranda warnings, he can properly waive his Sixth Amendment right to counsel for postindictment questioning with a Miranda waiver. See id. at 296.

A Sixth Amendment right to counsel attached for Colon's July 30, 1997 drug possession charge in state court. Colon alleged that he invoked his Sixth Amendment right to counsel on the basis of his claim that he retained counsel at the bail hearing for the charge. If Colon had requested counsel or an attorney had entered an appearance to defend Colon for the July 30, 1997 drug possession charge, he would have been deemed to invoke his Sixth Amendment right to counsel and, of course, the government would have been precluded from questioning him about that charge.

However, there is no credible evidence on the record that Colon had invoked his Sixth Amendment right to counsel. In fact, the government established that Colon had not invoked his right to counsel on his July 30, 1997 drug possession charge. On December 31, 1997, Agent Tropea specifically asked Colon whether he was represented by an attorney and Colon clearly stated that he was not. See Tr. at 87. On January 5, 1998, Tropea asked Colon for a second time whether he had an attorney and Colon again answered that he did not. See id. at 89-90. On January 15, 1998, for a third time, Tropea asked Colon if he had an attorney and, once again, Colon told the government that he did not have an attorney. See id. at 92-93. On January 26, 1998, Colon told Detectives Adomaitis and Lodise that he did not have an attorney and Adomaitis wrote a note, stating: “Needs a lawyer, see if we can get a court appointed lawyer.”

See Ex. G-H.[3]

In contrast to the evidence that Colon failed to invoke his Sixth Amendment right to counsel, no credible evidence was produced that Colon had invoked his right to counsel. There was no evidence that Colon ever requested an attorney or that Jarrett or any other attorney entered an appearance to represent Colon. The only evidence that Colon may have had an attorney was his own testimony at the suppression hearing that his mother hired Jarrett to arrange for bail for the July 30, 1997 charge, testimony that I do not credit. When Colon testified on the issue of Jarrett's representation, he was confused, vague and inconsistent. Initially, Colon insisted that he had never been arrested for the August 1, 1996 shooting. See Tr. at 124. After being reminded on cross-examination that he had been arrested for that shooting on December 31, 1997, he testified that his family retained Jarrett to represent him concerning the firearm charges in August, 1997. See id. at 128. Yet, Colon was not arrested on these shooting charges until five months later, on December 31, 1997. In response to other questioning, Colon confused the August 1, 1996 shooting with the July 30, 1997 drug arrest. See id. Furthermore, Colon testified that he did not remember meeting with Sargent Smith or Agent Tropea, although Tropea interviewed him on at least four separate occasions. See id. at 124, 128. I concluded that Colon's testimony was not credible and that Colon had not invoked his Sixth Amendment right to

[3] As further evidence that Colon did not have an attorney at the time of the interviews, Tropea immediately stopped an interview in February or March, 1998 when Colon stated that he did not want to cooperate with the government any further. See Tr. at 94. In addition, when Tropea learned that Colon had retained an attorney a few weeks later, Tropea and the federal prosecutor met with Colon and his attorney to negotiate a plea bargain for Colon. See id. at 95-96. Tropea's actions corroborate the conclusion that Colon did not have an attorney before the interviews and that the government was not trying to hoodwink Colon into giving a statement outside the presence of his counsel.

counsel on the July 30, 1997 state charge of drug possession.[4]

Because Colon had not invoked his Sixth Amendment right to counsel before the challenged interviews, Colon's waiver of his Miranda rights before the challenged interviews was constitutionally sufficient to waive his Sixth Amendment right to counsel. See Exs. G-B, G-C, G-D, G-E; see also, Patterson, 487 U.S. at 291. Furthermore, because Colon failed to invoke his Sixth Amendment right to counsel for the July 30, 1997 charge, it is irrelevant whether the offenses that were uncharged at the time of the interviews were inextricably intertwined with the July 30, 1997 charge.[5] Therefore, the government was free to question Colon about the July 30, 1997 charge and any other offenses without violating Colon's Sixth Amendment right to counsel. Because the questioning did not violate Colon's constitutional right to counsel, Colon's statements from the interviews on October 10, 1997, December 31, 1997, January 5, 1998, and January 15, 1998 were admissible in their entirety.

Even assuming Colon had invoked his Sixth Amendment right to counsel for the July 30,

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[4] Even assuming that Davis did not shift the burden to the defendant, the burden of proof in this case is irrelevant because Colon presented no credible evidence that he ever invoked his right to counsel.

[5] Even if Colon had invoked his right to counsel for the July 30, 1997 drug charge, the August 1, 1996 shooting, the Valentine Rodriguez shooting and the September 3, 1997 drug possession arrest were not inextricably intertwined to the July 30, 1997 drug offense under Arnold. Therefore, Colon's Sixth Amendment right to counsel for the July 30, 1997 charge would not have carried over to the other offenses, and the government questioning about August 1, 1996 shooting, the Valentine Rodriguez shooting and the September 3, 1997 offenses would not have violated Colon's Sixth Amendment right to counsel. Thus, Colon's statements about the August 1, 1996 shooting, the Valentine Rodriguez shooting and the September 3, 1997 drug offense would have been admissible even if Colon had invoked his Sixth Amendment right to counsel. Because Via questioned Colon solely about the August 1, 1996 shooting, the entire statement taken by Via would have been admissible even if Colon had invoked his right to counsel on the July 30, 1997 charge.

1997 charge, his right to counsel for that charge would not have carried over under Arnold to the charges in the federal indictment that arose from that arrest. The state charge stemming from the drug arrest on July 30, 1997 was arguably closely related to drug charges in Counts 1 and 3 of the federal indictment.[6] Nevertheless, the questioning by Smith on December 31, 1997, and by Tropea on December 31, 1997, January 5, 1998 and January 15, 1998 falls outside the ambit of Arnold. The "inextricably intertwined" exception itself is an extremely narrow one. See, e.g., Massachusetts v. Rainwater, 681 N.E.2d 1218, 1223, n. 5 (Mass. 1997) (citing Arnold, Whittlesey v. State, 665 A.2d 223 (Md. 1995) (stating "[the inextricably intertwined] exception has been applied in an extremely limited manner . . . very few [courts] have found occasion to apply it"); see also, Hendricks v. Vasquez, 974 F.2d 1099 (9th Cir. 1992) (stating that the inextricably intertwined exception is "limited"). Arnold holds that, in order to qualify for the very narrow exception to the offense-specific rule of McNeil, the uncharged offense must be "closely related" or "inextricably intertwined" with the charged offense. Arnold does not hold that if an uncharged offense is closely related to a pending charge the Sixth Amendment right to counsel automatically carries over to the uncharged offense. In Arnold, the government knew that Arnold had been charged with an underlying offense; in fact, the underlying charge was the "impetus" for the sting operation that violated Arnold's Sixth Amendment right to counsel. See Arnold, 106 F.3d at 42. The government also knew that Arnold had invoked his right to counsel on the pending charge. See id. at 41.

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[6] Count 1 of the federal indictment charged Colon with conspiracy to distribute cocaine and the circumstances of Colon's arrest on July 30, 1997 as an overt act of the conspiracy. Count 3 of the federal indictment charged Colon with possession with intent to distribute cocaine arising from the July 30, 1997 arrest.

The government did not know that Colon's July 30, 1997 arrest was related to the Ordaz conspiracy. The July 30, 1997 charge was one of many open charges in Colon's criminal history. In addition, Colon was eager to give his statements and told the government that he wanted to continue helping their investigation on several different occasions. See, e.g., Exs. G-C, G-D; see also, Tr. at 93. Colon also stated that he did not have counsel on at least four different occasions. See, e.g., Tr. at 87, 89-90, 92-93. Under these circumstances, ruling that the government had violated Colon's Sixth Amendment rights would require that the police scour through the entire criminal history of each potential informant to determine if the informant ever had an attorney for any charge and whether the charge was related to the crimes they are investigating, even when the informant insists he does not have an attorney and does not request to speak with one. Such a rule would force the police to conduct a collateral investigation into whether the suspect was telling the truth about not having a lawyer. The Sixth Amendment certainly does not require such extensive investigation by the police.[7] Therefore, the totality of the circumstances in this

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[7] In Davis, the Supreme Court expressed its concern for the need for effective law enforcement. It stated that:

> when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.

Id. at 460. The Court also held that if a suspect makes an ambiguous statement about an attorney, the police are not required to clarify whether the suspect is invoking his right to counsel. See id. at 461-62 (stating "we decline to adopt a rule requiring officers to ask clarifying questions").

In this case, the circumstances are even more compelling than those in Davis as obstacles to legitimate police investigative activity because Colon repeatedly denied that he had an attorney and was eager to give information to the police. While the Davis Court refused to require police to ask clarifying questions, this case would require police to stop questioning to investigate whether the suspect had ever had an attorney for any charge in any jurisdiction. Placing this

case are insufficient to overcome the Supreme Court holding in McNeil that the Sixth Amendment right to counsel attaches only to the charged offense. Thus, even assuming that Colon did invoke his Sixth Amendment right to counsel on the July 30, 1997 charge, which he did not, the government did not violate Colon's right to an attorney in the challenged interviews and Colon's statements about the July 30, 1997 arrest were admissible.

Fifth Amendment rights

In addition to his argument that the challenged interviews violated his Sixth Amendment rights, Colon claimed that the January 15, 1998 interview by Tropea violated his Fifth Amendment rights because Tropea failed to read Colon the Miranda warnings before the interview and Colon did not sign a Miranda waiver before giving his statement. The government responds that, after his two previous interviews of Colon on December 31, 1997 and January 5, 1998, Tropea assumed that Colon was a cooperating witness in the interview on January 15, 1998 and that Colon validly waived his Fifth Amendment rights before giving his statement.

The Fifth Amendment protects a suspect from the coercive pressures that result from custodial interrogation. See Miranda, 384 U.S. at 444. Unlike the Sixth Amendment right to counsel, which attaches to a specific charge, a suspect's Fifth Amendment right does not depend on the specific offense, but arises whenever that suspect is in custody and is subject to questioning. See id. When a suspect is subject to questioning while in government custody, the United States Supreme Court requires that the suspect be informed of his Fifth Amendment rights. See id. A suspect may waive his rights prior to police questioning. A waiver does not

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extraordinary burden on the police was clearly rejected by the Supreme Court in Davis.

require affirmative conduct by the suspect and may be implied from his conduct. See United States v. Cruz, 910 F.2d 1072, 1080 (3d Cir. 1990). If the suspect validly waives his Fifth Amendment rights, his statements can be admitted as evidence at trial. See Miranda, 384 U.S. at 444. A waiver of Miranda rights is valid only if it is (1) knowing and intelligent, and (2) voluntary. See id. A Miranda waiver is knowing and intelligent when the suspect has "a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." United States v. Velasquez, 885 F.2d 1076, 1087 (3d Cir. 1990)(quoting Moran v. Burbine, 475 U.S. at 421). A waiver is voluntary when the statement is "the product of free and deliberate choice rather than intimidation, coercion, or deception." Id. (quoting Moran, 475 U.S. at 421). To decide if a suspect knowingly, intelligently and voluntarily waived his Fifth Amendment rights, courts must examine the totality of the circumstances, including the background, experience, and conduct of the suspect. See Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); Velasquez, 885 F.2d at 1086 (quoting Oregon v. Bradshaw, 462 U.S. 1039, 1046, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983)). In considering the suspect's background, his prior experience with the criminal justice system is evidence of an understanding of his constitutional rights. See, e.g., Stumes v. Solem, 752 F.2d 317, 320 (8th Cir. 1985); United States v. Clarke, 881 F.Supp 115,117 (D. Del. 1995). If, in the totality of circumstances, a suspect knowingly, intelligently and voluntarily waives his Fifth Amendment rights, a significant lapse of time between the Miranda warnings and the questioning of the suspect will not invalidate the suspect's waiver. See Stumes, 752 F.2d at 320; Jarrell v. Balkcom, 735 F.2d 1242 (11th Cir. 1984); Maguire v. United States, 396 F.2d 327, 331 (9th Cir. 1968) (holding that a suspect knew of his Fifth Amendment rights at an interrogation three days after he

received Miranda warnings).

Colon claimed that his statement from the January 15, 1998 interview was inadmissible because Tropea failed to advise Colon of his Miranda warnings before the interview and his previous waiver was invalidated because ten days lapsed between the administering of the Miranda warnings at the January 5, 1998 interview and the interview on January 15, 1998. Reviewing the totality of the circumstances, however, the evidence clearly established that Colon knew of his Fifth Amendment rights and waived his rights before giving the statement to Tropea. Colon understood his Fifth Amendment rights at the January 15, 1998 interview because he invoked his Miranda right to remain silent at an interview after January 15, 1998. Although Colon conceivably could have learned of his Fifth Amendment rights after the January 15 interview and before the unsuccessful interview, he presented no evidence that he learned of his Fifth Amendment rights after the January 15, 1998 interview. Moreover, Colon received the Miranda warnings on four separate occasions before the January 15, 1998 interview, on October 10, 1997 with Via, December 31, 1997 with Smith and for a second time that day with Tropea, and January 5, 1998 with Tropea again. On each of these occasions, as the government agents recited the Miranda warnings, Colon read each of the Miranda rights and initialed his waiver of these rights. Beyond the four interviews in this matter, Colon's criminal history was extensive and included other previous arrests, see Ex. G-A, which provided evidence that Colon was familiar with his constitutional rights. See, e.g., Stumes, 752 F.2d at 320; Clarke, 881 F.Supp at 117. Furthermore, Colon demonstrated that he comprehended the consequences of making the statements when he stated that he wanted to continue cooperating with the government in order to help “indict” Lazara Ordaz. See Ex. G-C at 8. Therefore, Colon’s background, experience

and conduct demonstrate that Colon had a full awareness of both the nature of his Fifth Amendment rights and the consequences of the decision to abandon those rights at the January 15, 1998 interview.

Evidence also demonstrated that Colon waived his Fifth Amendment rights voluntarily at the January 15, 1998 interview. At the interview on January 15, 1998, Colon insisted to Tropea that he wanted to continue cooperating with the Ordaz investigation. See Tr. at 93 (Tropea testifying "[a]s he had done so in the past, he again insisted that he would continue to cooperate with us"). During the first four interviews on October 10, 1997, December 31, 1997, and January 5, 1998, Colon was also eager to provide information to the government regarding the Ordaz drug operation. For example, on December 31, 1997, Colon told Smith that he was cooperating with the government to exact revenge on his former boss because she refused to help him during his incarceration. Colon also told Smith that he wanted to continue to cooperate with the government in the future, stating: "[i]f everything turns out alright here you can call me or beep me and I'll help you indict Lazara [Ordaz] [because] she [sic] too smart." Ex. G-C at 8. Colon also told Tropea, Adomaitis and Lodise that he wanted to cooperate in the future, stating: "I want to help out in any way I can. I want to keep helping you." Ex. G-D. In contrast to the substantial evidence that Colon wanted to continue to cooperate with the government, there is no evidence that Colon was intimidated, coerced or deceived into speaking with Tropea on January 15, 1998. Therefore, I conclude that Colon knowingly, intelligently and voluntarily waived his Fifth Amendment rights before the January 15, 1998 interview. Because Colon waived his Fifth Amendment rights before the January 15, 1998 interview, the government questioning at that interview did not violate his Fifth Amendment rights and his statements during that interview

were properly admissible at trial.

CONCLUSION

I concluded that the government interviews of Colon on October 10, 1997, December 31, 1997, January 5, 1998, and January 15, 1998 did not violate Colon's Sixth Amendment rights, and therefore, the statements that he gave at those interviews were admissible at trial. Furthermore, I concluded that the interview on January 15, 1998 did not violate Colon's Fifth Amendment rights and the statement taken at that interview was admissible at trial.

ANITA B. BRODY, J.